84-1441

No.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

ROGER J. KAY, D.O.,

*Appellant,*

v.

THE COMMONWEALTH OF PENNSYLVANIA,

*Appellee.*

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ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

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# JURISDICTIONAL STATEMENT

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72 pp

## QUESTIONS PRESENTED

1. Whether Rule 319, Pennsylvania Rules of Criminal Procedure, as interpreted by the Pennsylvania courts, violates the Sixth Amendment to the United States Constitution, made obligatory upon the states via the Fourteenth Amendment, by permitting a trial judge before whom a defendant contemplates pleading guilty to a criminal charge to delegate the entirety of his colloquy and notification responsibilities to a prosecutor, and thereby maintain judicial silence throughout the duration of a plea tender hearing, as in the case *sub judice* ?

2. Whether Rule 320, Pennsylvania Rules of Criminal Procedure, as interpreted by the Pennsylvania courts, violates the First, Fifth and/or Sixth Amendments to the United States Constitution, made obligatory upon the states via the

Fourteenth Amendment, by affording to a trial judge unfettered discretion to deny a defendant's *presentence* motion to withdraw a guilty plea to a criminal charge, where the defendant has testified under oath that he tendered the plea unintelligently and involuntarily, notwithstanding the defendant's failure to assert his innocence, as in the case *sub judice* ?

3. Whether Rule 321, Pennsylvania Rules of Criminal Procedure, as interpreted by the Pennsylvania courts, violates the Due Process Clause, and/or the Equal Protection Clause, of the Fourteenth Amendment to the United States Constitution, by vesting in a trial judge unfettered discretion of deciding whether to sit alone or to convene a court *en banc* to hear a challenge to a guilty plea, as in the case *sub judice* ?

4. Whether the Pennsylvania Wiretapping and Electronic Surveillance Control Act, 18 Pa.C.S. §§ 5704 *et seq.*, as interpreted by the Pennsylvania courts violates the First, Fourth, Fifth and/or Sixth Amendments to the United States Constitution, made obligatory upon the states via the Fourteenth Amendment; and/or whether the same state statute is in conflict with the Wire Interception and Interception of Oral Communications provisions of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510, *et seq.*, as amended, in that the Pennsylvania statute in question permits "any investigative or law enforcement officer or any person ... to intercept a wire or oral communication involving suspected criminal activities [without a warrant or judicial or executive authorization] where ... (i) such officer or

person is a party to the communication", particularly where the interception was occasioned by Federal law officers, as in the case *sub judice* ?

5. Whether, on the "totality of the circumstances", Appellant's recanted guilty plea violates his rights under the First, Fourth, Fifth, and/or Sixth Amendments to the United States Constitution, made obligatory upon the states via the Fourteenth Amendment, in that the Appellant's guilty plea tender was made unknowingly, unintelligently, and/or involuntarily, and/or in that it was unsupported by record adequacy?

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THE COMMONWEALTH OF PENNSYLVANIA,

*Appellee.*

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**ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA**

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Appellant Roger J. Kay, D.O. appeals from the judgment and sentence of the Supreme Court of Pennsylvania entered on November 20, 1984, and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

## OPINION BELOW

The judgment of the Supreme Court of Pennsylvania, without opinion, is reported in ___ Pa. ___, ___ A.2d ___ (1984). The judgment and opinion of the Superior Court of Pennsylvania are reported in __Pa.Super. ___, 478 A.2d 1366 (1984). The decisions of both courts appear in Appendix B hereto, *infra*, p. 1b.

## JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on November 20, 1984. *Commonwealth v. Kay*, ___ Pa. ___, ___ A.2d ___ (1984); Appendix B, *infra*, p. 1b. Appellate jurisdiction of the Supreme Court of the United States is conferred by 28 U.S.C. Section 1257(2), because Appellant drew into question the validity of certain Pennsylvania statutes on the ground that they are repugnant to the Constitution or laws of the United States, and the state

court decision is in favor of their validity.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

At issue is whether 18 Pa.C.S. Section 5704, or Rule 319, Rule 320, or Rule 321, Pennsylvania Rules of Criminal Procedure, violate the First, Fourth, Fifth, Sixth or Fourteenth Amendments to the United States Constitution. For text, see Appendix A and Appendix D, *infra*.

## STATEMENT OF THE CASE

On October 9, 1981, Wayne F. Manis and other special agents of the Federal Bureau of Investigation, working undercover, met with Appellant, Dr. Roger J. Kay, at the Holiday Inn in Erie, Pennsylvania to talk about x-ray film that had been stolen and shipped in interstate commerce in violation of Federal laws. Appellant had become the focus of this criminal investigation since Federal agents were seeking incriminating

admissions from him. Conversations that day and all subsequent conversations between Appellant and the F.B.I. agents came to be recorded without Appellant's knowledge or consent, without a warrant, and without the administrative authorizations required under Federal law where Federal undercover officers are engaged in eavesdropping or wiretapping.

After offering repeatedly to "help" the Appellant to solve some of his "business" problems, the agents agreed to murder a Dr. Daniel Carneval, another physician and the Appellant's hospital supervisor, and they quoted Appellant the price of $10,000. for this service. Agent Manis, posing as some west-coast mobster named Tony Magliano, on October 9th told Appellant about his plans: "My intentions are to hit the doctor with some Rompun", a veterinary tranquilizer, to knock-out the victim without causing death

so that "if I get stopped before I get him to where I want him I'm not transporting a corpse. ... Once I get him to where I want him I'll hit him with some Succinylcholine" to stop his breathing. Appellant agreed to procure the drugs for Manis and on October 21, 1981, paid Manis $2,000. in cash for "travel expenses" related to the murder.

In between October 9th and October 21st Manis telephoned Appellant long-distance from California, still pretending to be Magliano, and kept inquiring how the murder plans were progressing. Manis encouraged Appellant to call another undercover agent named Joseph Mahoney, posing as Joe Numba, supposedly another mobster, whom Appellant did telephone on October 28, 1981. After Appellant called "Numba", Manis "Magliano" telephoned Appellant long-distance, this time from Colorado, so that by October 29, 1981, the F.B.I. was convinced Appellant

was serious about paying for Dr. Carneval's murder, and decided to end the charade.

On October 30, 1981, the F.B.I. arrested Appellant and confronted him with the tape recordings they had accumulated from his conversations with the undercover officers. So confronted, Appellant allegedly made a "confession" to the F.B.I., following which Appellant was indicted by a Federal grand jury on charges not germain to this appeal, and Pennsylvania state authorities began to prosecute Appellant for Solicitation to Commit Murder and Conspiracy to do Murder.

Appellant first objected to the wiretap and eavesdrop evidence and to Appellant's alleged "confession" at the Probable Cause Hearing held on December 14, 1981, at Erie, Pennsylvania, before District Justice John A. Vendetti. On May 3, 1982, Appellant on advice of his counsel at the time tendered a plea of guilty to the Solicitation charge

and was convicted of violating Pa.C.S.903. Appellant's counsel had advised him that none of the evidence gathered against him by the F.B.I. could be suppressed. During subsequent conversations with new counsel, including the undersigned, suppression was re-evaluated and Appellant moved the trial court *before* sentencing for permission to withdraw his guilty plea and exercise his constitutional right to a trial. Appellant contended in support of his Plea Withdrawal Motion that he had tendered the Guilty Plea involuntarily and unintelligently and that it was unsupported by a factual basis. He argued that the trial judge's silence all through the Plea Tender Hearing, where the prosecutor alone conducted a colloquy, was insufficient as a matter of law to afford him due process of law.

The trial court denied Appellant's Plea Withdrawal Motion on March 21, 1983, then

immediately on the same date proceeded to sentence Appellant to serve a prison term of between four and ten years, plus to pay a $5,000. fine and costs of prosecution.

The trial court ordered the sentence to run consecutively to the term Appellant at the time was serving in a Federal prison on Interstate Transportation of Stolen Property charges to which Appellant pleaded guilty as a result of the same undercover Federal criminal investigation.

On March 30, 1983, Appellant tendered a timely and proper Post-Sentence Motion for Guilty Plea Withdrawal but the trial court denied this motion on March 31, 1983. The Appellant tendered his timely and proper Notice of Appeal to the Superior Court of Pennsylvania on April 7, 1983. On July 20, 1984, the Superior Court of Pennsylvania affirmed Appellant's conviction and found expressly that the Pennsylvania Wiretapping

and Electronic Surveillance Control Act, 18 Pa.C.S. Section 5704, permits any law enforcement officer to secretively record conversations to which he is a party during a criminal investigation. For this reason, the Superior Court stated, Appellant could not have suppressed the evidence obtained during the undercover investigation; thus his trial counsel properly advised him to plead guilty and the trial court properly refused to permit Appellant to withdraw his guilty plea.

On August 17, 1984, Appellant filed his Petition for Allowance of Appeal before the Supreme Court of Pennsylvania, but the Supreme Court of Pennsylvania denied this Petition on November 20, 1984. On February 14, 1985, Appellant tendered a timely and proper Notice of Appeal to this Court.

Throughout the procedural history of the case, constitutional challenges to the

investigative and pleading procedures were incorporated fairly within the appellate arguments and denied by the state courts.

In the Brief for Appellant before the Superior Court of Pennsylvania, Appellant challenged the plea tender procedures, the absence of "record adequacy", and the lack of a sufficient colloquy as violating this Court's mandates in *Boykin v. Alabama*, 395 U.S. 238 (1969); *Brady v. United States*, 397 U.S. 742 (1970); and *McCarthy v. United States*, 394 U.S. 459 (1969). Moreover, the Appellant also challenged in the same brief the unconstitutionality of the warrantless and unconsensual surveillance and recording conversations between Appellant and undercover law enforcement officers as violating this Court's mandates in *Katz v. United States*, 389 U.S. 347 (1967) as well as the spirit and formalities of Federal eavesdropping laws. The Superior Court of Pennsylvania

disallowed Appellant's challenges by reasoning that, as to the surveillance, the law of Pennsylvania permits a law enforcement officer to record any conversation where he is a party to the same; *Katz v. United States*, __ Pa.Super. ____, 478 A2d 1336,1399 (1984) citing the Pennsylvania Wiretapping and Electronic Surveillance Control Act, 18 Pa. C.S. §§5704(2)(i); and that, as to the plea tender challenges, the Pennsylvania Rules of Criminal Procedure control despite the challenges under Federal law, because of Pennsylvania statutory law:

> Pa.R.Crim.P. 319 outlines a procedure to be followed that will assure the guilty plea is voluntarily tendered. *No more than the inquiries outlined in Pa.R.Crim.P. 319 is required. Commonwealth v. Kay, supra,* at ___' 478 A.2d 1366,1368. (Emphasis added).

Therefore, while the Superior Court of

Pennsylvania stopped short of an express ruling upholding the constitutionality of the Pennsylvania Rules of Criminal Procedure, it reached this result, *sub silencio*, a result the Supreme Court of Pennsylvania refused to review. (See the unreported order of the Supreme Court of Pennsylvania, *infra*, Appendix B at p. 11b).

## THE QUESTIONS ARE SUBSTANTIAL

Appellant is an "aggrieved" person who was a party to unlawful electronic police surveillance (see definition of aggrieved person under Pennsylvania law, *infra*, within Appendix A at p. 2a). Therefore, the Appellant is entitled to have the courts decide the merits of his disputed issues and, consequently, Appellant has standing under Federal law. *Warth v. Seldin*, 422 U.S. 490,498 (1975). Appellant has suffered actual injury, *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979) because his plea

of guilty and conviction have caused him to be incarcerated for the past two years. This injury can fairly be traced to court and police actions complained of, without which Appellant would either not have been arrested or could have suppressed results of police misconduct prior to or at trial. Vacation of Appellant's guilty plea would afford him his right to trial and right to suppress evidence unlawfully obtained, so that the wrong done to Appellant is likely to be redressed by a favorable decision in this Court. *Valley Forge, etc. v. Americans United, etc.*, 454 U.S. 464,465 (1982). In short, Appellant is an "aggrieved person" entitled to seek suppression of evidence against him under *Alderman v. United States*, 394 U.S. 165,171 (1969).

In considering Appellant's contentions, this Court should recall its own warning that "[few] threats to liberty exist which

are greater than that posed by the use of eavesdropping devices." *Berger v. New York*, 388 U.S. 41, 63 (1967). Wherever a person may be, "he is entitled to know that he will remain free from unreasonable searches and seizures. *Katz v. United States*, 389 U.S. 347,359 (1967). This case involves much more than police surveillance in the hotel room or on the telephone where the Appellant made incriminating statements. This case goes to the heart of fair and just judicial practices within the court room, for, if an aggrieved person cannot redress through the courts whatever harm has befallen him at the hands of police, than whatever civil rights Appellant may have on paper cannot be brought to life to give him protection when he needs help.

After being paid $50,000., Appellant's trial counsel proceeded cursorily to tell Appellant to plead guilty to an infamous

crime by simply stating, *ex cathedra*, that Appellant could not suppress the fruits of a warrantless and unconsensual electronic police surveillance because a Pennsylvania statute allows the same. Trial counsel even cited this Court's ruling in *United States v. White*, 401 U.S. 745 (1971), with a preposterous misinterpretation:

> [T]here was a Supreme Court decision in 1971, U.S. versus White, it simply says that nonconsentual recordings by undercover agents of conversations with a participant in an ongoing offense does not violate any Fourth Amendment right. T.R. at 124-125.

*White* says no such thing. In fact, *White* is ambiguous for what it does not say and for the fact that it was a plurality, not a majority, decision. The instant case could afford this Court an opportunity to clarify certain aspects of *White*, so that

lawyers cease to misadvise their clients.

Even more shocking than Appellant's trial counsel's advice was the treatment of Appellant's calamity by Pennsylvania courts which ignored at every level the argument by Appellant's appellate counsel that Pennsylvania statutory procedures in use by both police and the courts violate Federal laws which, under the doctrine of pre-emption, must take precedence. The Superior Court of Pennsylvania appeared thoroughly oblivious to this Court's decisions in cases such as *Boykin v. Alabama*, 395 U.S. 238 (1969) and *McCarthy v. United States*, 394 U.S. 459 (1969), when its panel wrote in Appellant's case:

> The appellant contends the record is inadequate because the prosecutor and not the trial judge questioned the appellant. Both Pa.R.Crim.P.319 and the case law clearly state that

> the examination of the pleading party need not be performed by the court alone. Either counsel may conduct part or all of the examination. *Commonwealth v. Kay*, ___ Pa.Super. ___, 478 A.2d 1366,1368 (1984).

Thus, not only does this case reflect a defendant whose Constitutional or other rights may have been violated by police, but it reflects a defendant whose rights to challenge police violations in a court of law were infringed by the trial judge and trial counsel. Repeatedly, this Court has deemed more substantial violations of rights that occur inside compared with outside the courtroom. See *Stone v. Powell*, 428 U.S. 465 (1976); *Blackledge v. Perry*, 417 U.S. 21 (1974).

A. THE WIRETAPPING AND ELECTRONIC SURVEILLANCE CONTROL ACT OF PENNSYLVANIA IS UNCONSTITUTIONAL.

It is well-established that Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-20, and the Fourth Amendment to the United States Constitution "establish the outer limits of any intrusion into the protected privacy area." See *United States v. Geller*, 560 F.Supp. 1309,1312 (E.D.Pa. 1983). The state statute that permits greater police intrusion must give way to Federal law or be invalidated as repugnant to the Fourth Amendment. Yet, state statutes that are more protective of privacy must be given effect even in Federal courts. *Id.*

The Pennsylvania Wiretapping and Electronic Surveillance Control Act makes it a crime for the ordinary citizen to "intercept" a wire or an oral communication even if he is a party to the same, without permission from the Superior Court. 18 Pa. C.S. § 5703. Yet, the same act contains a

provision excepting police from statutory regulation during investigations of some criminal offenses:

> It shall not be unlawful under this chapter for:
>
> ...
>
> (2) Any investigative or law enforcement officer or any person acting at the direction or request of an investigative or law enforcement officer to intercept a wire or oral communication involving suspected criminal activities where:
>
> (i) such officer or person is a party to the communication. 18 Pa.C.S. § 5704.

Thus, 18 Pa.C.S. § 5704 permits law enforcement officers to record conversations in which they are involved, but also 18 Pa.C.S. § 5703 deprives others of this same opportunity. As the United States

District Court for the Eastern District of Pennsylvania remarked in a case before it involving similar facts:

> Worse, ordinary citizens who record their conversations without the knowledge of the person with whom they are speaking commit a criminal offense. ...Hence, ... Pennsylvania law enforcement officers can selectively record incriminating conversations and thereby entrap unwary citizens. Citizens, however, possess no correlative right to record their exculpatory conversations. *United States v. Geller, supra,* at 1313.

Hence, Pennsylvania law enforcement officers can selectively record incriminating conversations and thereby entrap unwary citizens. Citizens, however, possess no correlative right to record their exculpatory conversations.

Hence, this Pennsylvania statute puts citizens and potential defendants at an unconstitutional disadvantage because it forces them either to commit a crime by recording conversations, or submit to possible entrapment. *Id.* The Pennsylvania law, therefore, creates a constitutional imbalance by granting to state officers or Federal officers specified rights but denying similar rights to ordinary people. See *Washington v. Texas*, 388 U.S. 14,23 (1967).

"[T]he protection of privacy was an overriding Congressional concern" in enacting Title III. *Gelbard v. United States*, 408 U.S. 41,48 (1972). Indeed, Congress seems to have intended therein to create "a comprehensive scheme for the regulation of wiretapping and electronic surveillance." *Id.* at 46. As the United States District Court for the Northern District of Illinois, Eastern Division, noted masterfully

in *United States v. Torres*, 583 F.Supp. 86, 89 (1984):

> This Congressional solicitude for safeguarding of privacy was clearly expressed in the Senate Committee Report on Title III. It was there said that "Title III has as its dual purpose (1) protecting the privacy of wire and oral communications, and (2) *delineating on a uniform basis* the conditions under which the interception of wire and oral communications may be authorized." S.Rep.No. 1097, 90th Cong.2d Sess. 66 (1968). (Emphasis added).

If Congress did envision such uniformity in the authorization of wire and oral communications, it seems hardly likely it intended state laws to contravene spirit and form of Title III. It seems even less likely Congress intended a statute such as

Pennsylvania's Act to unreasonably broaden the warrantless surveillance powers of *Federal* law enforcement officers, the end product of the instant case.

Moreover, the Pennsylvania statute in question is replete with vague definitions, and without explanation makes distinction between "organized" and other crimes, relaxing Constitutional safeguards where law officers contend they are investigating the former.

B. THE PENNSYLVANIA RULES OF CRIMINAL PROCEDURE, RULES 319, 320 AND 321, ARE UNCONSTITUTIONAL.

The principle known as "record adequacy" compels that the transcribed record of a guilty plea to a criminal charge show the defendant tendered his plea (1) knowingly, (2) intelligently and (3) voluntarily, and that (4) there exists a "factual basis" for that plea. *Boykin v. Alabama*, 395 U.S. 238

(1969). As this Court warned: There is no adequate substitute for demonstrating *in the record at the time the plea is entered* the defendant's understanding of the nature of the charges against him. *McCarthy v. United States*, 394 U.S. 459,470 (1969). (Emphasis in the original).

This Court has explained the reason and purpose of "record adequacy":

> Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered. ... First, is the privilege against compulsory self-incrimination. ... Second, is the right to trial by jury ... . Third, is the right to confront one's accusers. ... We cannot presume a waiver of these three important federal rights from a silent record.

*Boykin v. Alabama, supra,* at 243.

Thus, that "record adequacy" is a Federal

Constitutional right has been established clearly by this Court.

Moreover, this Court has warned trial judges against presuming anything from a "silent record", because the goal of determining a pleading defendant's voluntariness is:

> undermined in proportion to the degree the [trial] judge resorts to "assumptions" not based upon recorded responses to his inquiries.

*McCarthy v. United States*, *supra*, at 467. This Court has urged even more:

> [The trial court's] *personally* addressing the defendant as to his understanding of the essential elements of the charge to which he pleads guilty would seem a necessary prerequesite to a determination that he understands the meaning of the charge. *Id.* at 467-468, n.20. (Emphasis added).

It seems rather obvious, therefore, that the spirit, if not the letter, of *McCarthy* mandates that a judge not delegate these notification and colloquy responsibilities to another, such as a prosecutor.

Yet, in the instant case, at the plea tender hearing the trial judge failed to address the Appellant at all, electing to remain silent himself and let the "record" (such as it was) be built by the assistant district attorney. Upon challenge, the Superior Court of Pennsylvania ruled that this is permissible under Rule 319, Rules of Criminal Procedure. *Commonwealth v. Kay*, *supra*, at ___, 478 A.2d 1366,1368. What seems to be lacking in this Pennsylvania statute is the word "personally." Nowhere within the statute (rule) is mention made that the judge must "personally conduct" a colloquy of the pleading defendant.

Nor does Rule 320 seem to meet Constit-

utional muster anymore than Rile 319 does. Although the Rule affords the trial judge "discretion" to "permit or direct" that a guilty plea be withdrawn, it fails to properly set a standard for the exercise of this discretion. In this sense, the Rule seems to violate this Court's mandate set forth as early as *Panama Refining Co. v. Ryan*, 293 U.S. 338,340 (1935), that legislative delegation may be unlawful where the time, occasion, and necessity of the delegation have in the end been left todiscretion of the delegate. It has been long-established that, to be lawful, legislative delegation must set forth the parameters of the discretion being vested. See *Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935). For the same reasons, Rule 321 seems to be lacking, in that the trial judge alone is empowered to decide whether to convene a court *en banc* to hear and determine a chal-

lenge to a guilty plea, or hear and determine that challenge himself.

In the instant case, Appellant was the victim of an abuse of judicial discretion which abuse the Pennsylvania judiciary upheld simply because of the statutory language recited within the Pennsylvania Criminal Procedure Rules. This case itself is very much akin to *Henderson v. Morgan*, 426 U.S. 637 (1976), where this Court vacated a guilty plea purportedly tendered by the defendant who had not been instructed in the meaning of the required *mens rea*. Nor had Appellant been so instructed before he entered his plea, as he so testified when, *prior* to sentencing, he sought withdrawal of that plea. Indeed, if Pennsylvania's Wiretapping and Electronic Surveillance Control Act is unconstitutional, as the Appellant has contended, then Appennant

never should have been brought into court at all, and this case thereupon should be given summary disposition, as this Court afforded to the defendants in *Blackledge v. Perry*, 417 U.S. 21 (1974) and *Menna v. New York*, 423 U.S. 61 (1975). A sequelae of improper events occurred as the Appellant at bar became the target of an abusively unconstitutional search and seizure. The search and seizure should have been foreclosed rather than inspired by state law, but it was not. Moreover, once inside a court of law, Appellant's wrongs should have been redressed promptly, but because of faulty Pennsylvania statutes this did not happen. The questions of law raised herein go to the root of the judicial process and are very substantial.

## CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction and the

appeal should be granted.

Respectfully submitted,

DAVID ARTHUR JONES

# APPENDIX A

## 18 Pa.C.S. Chapter 57

## WIRETAPPING AND ELECTRONIC SURVEILLANCE

Sec.

5701. Short title of chapter.

5702. Definitions.

5703. Interception, disclosure or use of wire or oral communications.

5704. Exceptions to prohibition on interception and disclosure of communications.

...

### Expiration

*Section 3 of Act of 1978, Oct. 4, P.L. 831, No. 164, provides that said Act shall take effect in 60 days and that this chapter shall expire five years thereafter.*

...

### § 5701. Short title of chapter.

This chapter shall be known and may be cited as the "Wiretapping and Electronic Surveillance Control Act."

...

§ 5702. Definitions.

As used in this chapter, the following words and phrases shall have the meanings given to them in this section unless the context clearly indicates otherwise.

"Aggrieved person." A person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

...

"Contents." As used with respect to any wire or oral communication, is any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication.

...

"Investigating or law enforcement officer." Any officer of the United States or of the Commonwealth or political subdivision thereof, who is empowered by law to con-

duct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offense. The term shall include, but not be limited to, employees of the Pennsylvania Crime Commission, authorized to investigate crimes enumerated in section 5708 (relating to order authorizing interception of wire or oral communications.

...

"Person." Any employee, or agent, of the United States or any state or political subdivision thereof, and any individual, partnership, association, joint stock company, trust or corporation.

"Wire communications." Any communication made in whole or in part through the use of facilities for the transmission of communication by wire, cable or other like connection between the point of origin

and the point of reception furnished or operated by a telephone, telegraph or radio company for hire as a communication common carrier.

...

§ 5703. Interception, disclosure or use of wire or oral communications

Except as otherwise provided in this chapter, a person is guilty of a felony of the third degree if he:

(1) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept any wire or oral communication.

(2) willfully discloses or endeavors to disclose to any other person the contents of any wire or oral communication, or evidence derived therefrom, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication; or

(3) willfully uses or endeavors to use

the contents of any wire or oral communications, or evidence derived therefrom, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication.

...

§ 5704. Exceptions to prohibition on interception and disclosure of communications

It shall not be unlawful under this chapter for:

...

(2) Any investigative or law enforcement officer or any person acting at the direction or request of an investigative or law enforcement officer to intercept a wire or oral communication involving suspected criminal activities where:

(i) such officer or person is a party to the communication; or

(ii) one of the parties to the

communication has given prior consent to such interception. However, no interception under this paragraph shall be made unless the Attorney General or a deputy attorney general designated in writing by the Attorney General, or the district attorney, or an assistant district attorney designated in writing by the district attorney, of the county wherein the interception is to be made, has reviewed the facts and is satisfied that the consent is voluntary and has given prior approval for the interception; however such interception shall be subject to the recording and record keeping requirements of section 5714(a) ... and that the Attorney General, deputy attorney general, district attorney or assistant district attorney authorizing the interception shall be the custodian of recorded evidence obtained therefrom.

...

18 [now 42] Pa.C.S. Rules 319-321

PENNSYLVANIA RULES OF CRIMINAL PROCEDURE

RULE 319. PLEA AND PLEA AGREEMENTS.

(a) GENERALLY. Pleas shall be taken in open court.

(b) PLEA AGREEMENTS.

(1) The trial judge shall not participate in the plea negotiations preceding an agreement.

(2) When counsel for both sides have arrived at a plea agreement they shall state on the record in open court, in the presence of the defendant, the terms of the agreement. Thereupon the judge shall conduct an inquiry of the defendant on the record to determine whether he understands and concurs in agreement.

(3) If the judge is satisfied that the plea is understandingly and voluntarily tendered, he may accept the plea. If thereafter the judge decides not to concur in the plea agreement, he shall permit the defendant to withdraw his plea.

...

RULE 320. WITHDRAWAL OF PLEA OF GUILTY.

At any time before sentence, the court may in its discretion, permit or direct a plea of guilty to be withdrawn and a plea

of not guilty to be substituted.

RULE 321. CHALLENGE TO GUILTY PLEA.

(a) A motion challenging the validity of a guilty plea, or the denial of a motion to withdraw a guilty plea shall be in writing and shall be filed with the trial court within ten (10) days after imposition of sentence. ...

(b) The motion shall be disposed of promptly.

(c) The trial court may schedule a hearing on the motion and shall determine whether the motion shall be argued before one judge alone or before a panel of judges sitting as a court *en banc*. Whenever a single judge hears the motion alone, the judge may make any ruling that could be made by a court *en banc*.

The Constitutional Amendments involved are printed in Appendix D, *infra*.

APPENDIX B

Opinion, *Commonwealth v. Kay*, 478 A.2d 1366 (Pa.Super. 1984)

COMMONWEALTH of Pennsylvania

v.

Roger J. KAY, D.O., Appellant.

No. 538 Pittsburgh, 1983

David Jones, Pittsburgh, for appellant.

Shad Connelly, Asst. Dist. Atty., Erie, for Commonwealth, appellee.

Before ROWLEY, JOHNSON and POPOVICH, JJ.

JOHNSON, Judge:

Appellant Roger Kay, an osteopathic physician, was charged with solicitation to commit murder[1] and criminal conspiracy[2] based upon his role in an attempt to have murdered another local physician at the hospital where the appellant was employed. Appellant had arranged with another

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[1] 18 Pa.C.S. § 902.

[2] *Id.* § 903.

associate at the hospital for a Tony Magliano to carry out the "contract killing". On October 30, 1981, the date of appellant's arrest, he was informed that Tony Magliano was in reality an FBI undercover agent, who was later identified as agent Wayne Manis. A number of personal contacts and phone conversations between the appellant and "Tony Magliano" were the subject of electronic surveillance and had been recorded.

The matter was initially scheduled for trial in March of 1982 in the Erie County Court of Common Pleas, but it was continued at the request of appellant's trial counsel. Before the trial was rescheduled, the appellant entered a guilty plea to the solicitation charge on May 3, 1982. Sentencing was postponed throughout 1982, and the initial sentencing judge recused himself on February 25, 1983.

Appellant's trial counsel withdrew from the case at appellant's request. Appellant's present counsel filed a petition to withdraw the guilty plea on March 18, 1983, three days prior to the scheduled sentencing hearing. At the hearing on March 21, 1983, the trial court judge denied appellant's motion to withdraw his guilty plea and sentenced the appellant to a four to ten year term of imprisonment. Appellant's counsel then filed on March 30, 1983 a post-sentence motion to withdraw the guilty plea and a motion to modify sentence. These motions were denied by the trial judge on March 31, 1983. The present appeal follows the denial of appellant's motions to withdraw the guilty plea and to reduce the sentence.

The appellant presents four arguments for our review. First, he contends the trial court erred in not allowing him to

withdraw his guilty plea prior to sentencing because he did not enter it knowingly and intelligently and because there is inadequate record evidence to indicate he did. A presentence motion to withdraw a guilty plea will be liberally allowed if the appellant demonstrates "fair and just" reason for the withdrawal, unless the prosecution has suffered substantial prejudice by its reliance on the guilty plea. *Commonwealth* v. *Forbes*, 450 Pa. 185, 299 A.2d 268 (1973); *Commonwealth* v. *Campbell*, 309 Pa. Super. 214, 455 A.2d 126 (1983).

What plea to enter must be a decision by the accused which is voluntarily and intelligently made. *Commonwealth* v. *Forbes*, *supra*. Pa.R.Crim.P. 319 outlines a procedure to be followed that will assure the guilty plea is voluntarily tendered. No more than the inquiries outlined in Pa.R. Crim.P. 319 is required. *Commonwealth* v.

*Anthony*, ___ Pa. ___, 475 A.2d 1303 (1984).

Our review of the guilty plea proceedings that occurred on May 3, 1982 convinces us that the record completely refutes appellant's allegations. This proceeding more than adequately met the requirements of Pa.R.Crim.P. 319. All that preceded the entry of appellant's plea fully apprised him of the nature of the charges and the rights available to him. Nothing in the record indicates the appellant entered his guilty plea unknowingly or involuntarily.

The appellant contends the record is inadequate because the prosecutor and not the trial judge questioned the appellant. Both Pa.R.Crim.P. 319 and the case law clearly state that the examination of the pleading party need not be performed by the court alone. Either counsel may conduct part or all of the examination.

The essential element is recording that the pleading party is aware of the ramifications of his pleading posture; the law permits counsel to take part in this documentation. See *Commonwealth v. Ingram*, 455 Pa. 198, 316 A.2d 77 (1974). Therefore, appellant's attack on the record's adequacy is without merit.

Relatedly, appellant's second claim is the trial court should have allowed him to withdraw his guilty plea because he was not fully apprised of all the defenses he may have asserted. This court has recognized that an assertion of innocence constitutes a fair and just reason for permitting the withdrawal of a guilty plea. *Commonwealth v. Whittall*, 304 Pa.Super. 258, 450 A.2d 669 (1982). However, as the trial judge recognized in refusing appellant's guilty plea withdrawal, the appellant has never, not even implicitly, asserted his innocence. (N. T. March 21, 1983 at 129.) The contention that he now

has a possible defense does not amount to an assertion of innocence, and, thus, appellant offers no "fair and just" reason why he should be allowed to withdraw his guilty plea. *Commonwealth v. Dorian*, 314 Pa. Super. 244, 460 A.2d 1121 (1983).[3]

Third, appellant claims his guilty plea was not voluntary due to the ineffectiveness of trial counsel. "It is well settled that '[w]hen confronted with a claim of

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3 Appellant's trial counsel testified at the guilty plea withdrawal hearing that he did discuss with the appellant the merits of any defense. Because appellant's claim does not present an acceptable basis on which to withdraw his guilty plea, the trial court did not have to resolve this credibility question.

Furthermore, since appellant has not met the initial "fair and just" criteria of *Forbes*, we do not have to determine whether the Commonwealth has been substantially prejudiced by its reliance on the guilty plea. However, we do note there is uncontested testimony in the record that the Commonwealth would have substantial administrative and logistic problems, based upon its reliance on the guilty plea, if it were now required to present its case. (N.T. March 21, 1983 at 114-119.)

ineffective assistance of counsel, we must first ascertain whether the issue underlying the issue of ineffectiveness is of arguable merit, and if so, it must be determined whether the course chosen by counsel had some reasonable basis to effectuate his client's interests.'" *Commonwealth v. Lewis*, 314 Pa.Super. 298, ___, 460 A.2d 1149,1151 (1983) (citations omitted). See also *Commonwealth v. Evans*, 489 Pa. 85, 413 A.2d 1025 (1980).

Appellant claims trial counsel was ineffective for failing to suppress electronically recorded testimony between himself and undercover agent Manis. This purported failing on trial counsel's part allegedly duped the appellant into pleading guilty. Trial counsel testified that one of the reasons he did not attempt to suppress this information was based upon his knowledge that the relevant Pennsylvania statute permits an undercover agent to lawfully record conversations to which

he is a party. (N.T. March 21, 1983 at 96).

The Pennsylvania Wiretapping and Electronic Surveillance Control Act provides in 18 Pa.C.S. § 5704(2)(i):

> Exceptions to prohibitions on interception and disclosure of communications
>
> It shall not be unlawful under this chapter for:
>
> ...
>
> (2) Any investigative officer or any person acting at the direction or request of an investigative or law enforcement officer to intercept a wire or oral communication involving suspected criminal activities where:
>
> (i) such officer or person is a party to the communications;

Therefore, trial counsel's decision that a suppression motion would not be successful has a clear basis in the law.

Consequently, since appellant's claim has no merit, the trial attorney's posture on this issue was not ineffective counsel.

Fourth, appellant claims the trial court abused its discretion by refusing to permit the appellant during sentencing the opportunity to call witnesses to testify on his own behalf and by imposing a prison sentence upon impermissible considerations. Regarding the first aspect of this claim, the defense counsel at the beginning of the March 21, 1983 hearing expressly stated he was prepared to proceed with sentencing at the conclusion of the trial court's consideration of appellant's motion to withdraw the guilty plea. At no time during the sentencing proceedings did appellant's counsel indicate he was unprepared, due to the unavailability of witnesses or otherwise, to continue. Therefore, we find this contention to be meritless.

> "The imposition of sentence is a matter vested in the sound discretion of the sentencing judge, whose determination will not be disturbed on appeal absent a manifest abuse of discretion.... If the sentence is within statutory limits there is no abuse of discretion unless the sentence is so manifestly excessive as to inflict too severe a punishment."

*Commonwealth v. Russell*, 313 Pa.Super 534, 460 A.2d 313 (1983) (citations omitted).

Upon reviewing the sentencing record, it is clear appellant's claim that the sentence was based upon impermissible considerations is totally without merit. Nothing in the record indicates the trial judge sentenced the appellant to an excessive sentence based upon impermissible

considerations.

For the foregoing reasons, the trial court's March 21, 1983 judgment of sentence and the March 31, 1983 orders denying withdrawal of the guilty plea and denying the reduction of sentence is affirmed.

SUPERIOR COURT OF PENNSYLVANIA
PITTSBURGH DISTRICT

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|---|---|---|
| COMMONWEALTH OF PENNSYLVANIA | : | |
| | : | |
| v. | : | No. 538 |
| | : | PITTSBURGH, |
| ROGER J. KAY, D.O., | : | 1983 |
| Appellant. | : | |

ORDER

AND NOW, this 20th day of July, 1984, it is ordered as follows:

Judgment of Sentence Affirmed.

BY THE COURT

s/ Irma T. Gardner
Deputy Prothonotary

SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

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| COMMONWEALTH OF PENNSYLVANIA | : | No. 270 Western District Allocatur Docket, 1984 |
| v. | : | |
| ROGER J. KAY, D.O., | : | |
| Appellant. | : | |

November 20, 1984

ORDER OF COURT

"November 19, 1984
Petition Denied
Per Curiam"

s/ Carl Rice

Carl Rice, Esq.
[Prothonotary]

APPENDIX C

Notice of Appeal

IN THE SUPREME COURT OF PENNSYLVANIA
Western District

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|---|---|---|
| COMMONWEALTH OF PENNSYLVANIA, Appellee, | : | No. 270 Alloca- tur |
| v. | : | Docket, |
| ROGER J. KAY, D.O., Appellant. | : | 1984 |

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

I. Notice is hereby given that Roger J. Kay, D.O., the Appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of Pennsylvania denying review of the judgment of conviction and sentence, entered herein on November 20, 1984.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Appellant was convicted of the crime of criminal solicitation to commit murder, in violation of 18 Pa.C.S. § 902, and was sentenced to pay the costs of his prosecution and to prison confinement for a period of between four and ten years. He is presently confined at the State Correctional Institute, Rockview.

II. The clerk will please prepare a transcript of the record in this case, for transmission to the clerk of the Supreme Court of the United States, and include in said transcript the following:

A. The accusatory instrument(s).

B. Transcript of the Plea Tender Hearing of May 3, 1982 before the Honorable Jess S. Jiuliante, Jr., Judge of the Court Of Common Pleas of Erie County, Pennsylvania.

C. Appellant's presentence Motion to Withdraw Guilty Plea, dated March 18, 1983.

D. Transcript of the Plea Withdrawal and Sentencing Proceedings of March 21, 1983 before the Honorable James B. Dwyer, President Judge of the Court of Common Pleas of Erie County, Pennsylvania.

E. Appellant's Post - Sentence Motions to Withdraw Guilty Plea and to Reduce or Modify Sentence, dated March 30, 1983.

F. Appellant's Notice of Appeal to the Superior Court of Pennsylvania, dated April 7, 1983.

G. Brief of Appellant in the Superior Court of Pennsylvania at No. 538 Pittsburgh, 1983.

H. The Judgment, Opinion and Order of the Superior Court of Pennsylvania at No. 538 Pittsburgh, 1983, entered on July 20, 1984, affirming Appellant's conviction and sentence.

I. Appellant's Petition for Allowance of Appeal to the Supreme Court of Pennsylvania at No. 270 W.D. Allocatur Docket, 1984.

J. The Order of the Supreme Court of Pennsylvania at No. 270 W.D. Allocatur Docket, 1984, entered on November 20, 1984 denying review of Appellant's conviction and sentence.

K. Appellant's Notice of Appeal to the Supreme Court of the United States.

III. The following questions are presented by this appeal:

1. Whether Rule 319, Pennsylvania Rules of Criminal Procedure, as interpreted by the Pennsylvania courts, violates the Sixth Amendment to the United States Constitution, made obligatory upon the states via the Fourteenth Amendment, by permitting a trial judge before whom a defendant contemplates pleading guilty to

a criminal charge to delegate the entirety of his colloquy and notification responsibilities to a prosecutor, and thereby maintain judicial silence throughout the duration of a plea tender hearing, as in the case sub judice?

2. Whether Rule 320, Pennsylvania Rules of Criminal Procedure, as interpreted by the Pennsylvania courts, violates the First, Fifth and/or Sixth Amendments to the United States Constitution, made obligatory upon the states via the Fourteenth Amendment, by affording to a trial judge unfettered discretion to deny a defendant's presentence motion to withdraw a guilty plea to a criminal charge, where the defendant has testified under oath that he tendered the plea unintelligently and involuntarily, notwithstanding the defendant's failure to assert his innocence, as in the case sub judice?

3. Whether Rule 321, Pennsylvania Rules of Criminal Procedure, as interpreted by the Pennsylvania courts, violates the Due Process Clause and/or the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, by vesting in a trial judge unfettered discretion of deciding whether to sit alone or to convene a court en banc to hear a challenge to a guilty plea, as in the case sub judice?

4. Whether the Pennsylvania Wiretapping and Electronic Surveillance Control Act, 18 Pa.C.S. § 5704 et seq., as interpreted by the Pennsylvania courts, violates the First, Fourth, Fifth and/or Sixth Amendments to the United States Constitution, made obligatory upon the states via the Fourteenth Amendment; and/or whether the same state statute is in conflict with the Wire Interception and Interception of Oral Communications

provisions of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510, et seq., as amended, in that the Pennsylvania statute in question permits "any investigative or law enforcement officer or any person ... to intercept a wire or oral communication involving suspected criminal activities [without a warrant or judicial or executive authorization] where ... (i) such officer or person is a party to the communication", particularly where the interception was occasioned by Federal law officers, as in the case sub judice?

5. Whether, on the "totality of the circumstances", Appellant's recanted guilty plea violates his rights under the First, Fourth, Fifth and/or Sixth Amendments to the United States Constitution, made obligatory upon the states via the Fourteenth Amendment, in that the Appellant's guilty plea tender was

made unknowingly, unintelligently, and/or involuntarily and/or in that it was unsupported by record adequacy?

Respectfully submitted,

s/ David A. Jones
DAVID A. JONES, ESQUIRE

## APPENDIX D

Amendments to United States Constitution

### AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

### AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affrimation, and particularly describing the place to be searched, and the persons or things to be seized.

### AMENDMENT V

No person shall be held to answer for a

capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury ...; nor shall any person ... be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law ... .

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, ... and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

AMENDMENT XIV

Section 1. ... No State shall make or en-

force any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The statutory provisions involved are printed in Appeldix A, *supra*.